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**ENDORSED
FILED
ALAMEDA COUNTY**

JUN 24 2020

CLERK OF THE SUPERIOR COURT
By Ellen Romero Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,

Plaintiff,

vs.

ROSS STORES, INC.,

Defendant.

Case No.: RG19041441
Dept.: 15
Judge: Evelio Grillo

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

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

BACKGROUND OF THE CASE

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

2. This complaint is a representative action brought by Plaintiff in the public interest 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 Instant Artist acrylic paint sets sold and/or distributed by defendants Ross Stores, Inc. ("Ross

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FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF -
VIOLATION OF HEALTH & SAFETY CODE §25249.5

Filed By Fax

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1 Stores”) and Spicebox Product Development, Ltd. (“Spicebox”) (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 known
5 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since
6 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
7 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
8 reproductive toxicity.

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
10 within California or sell products therein to comply with Proposition 65 regulations. Included in
11 such regulations is the requirement that businesses must label any product containing a Proposition
12 65-listed chemical with a “clear and reasonable” warning before “knowingly and intentionally”
13 exposing any person to it.

14 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
15 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
16 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
17 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
18 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
19 25249.7.

20 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in
21 California, without a requisite exposure warning, Instant Artist acrylic paint sets (the “Products”)
22 that expose persons to DEHP.

23 7. Defendants’ failure to warn consumers and other individuals in California of the
24 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution
25 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and civil
26 penalties described herein.

27 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

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 Ross Stores, 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 Ross Stores is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

12. Defendant Spicebox, through its business, effectively 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 imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant Spicebox 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 continue 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 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement

1 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
2 jurisdiction over this lawsuit.

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

9 **STATUTORY BACKGROUND**

10 16. The people of the State of California declared in Proposition 65 their right “[t]o be
11 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
12 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

13 17. To effect this goal, Proposition 65 requires that individuals be provided with a
14 “clear and reasonable warning” before being exposed to substances listed by the State of California
15 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

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

18 18. An exposure to a chemical in a consumer product is one “which results from a
19 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
20 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
21 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
22 shall provide a warning to any person to whom the product is sold or transferred unless the product
23 is packaged or labeled with a clear and reasonable warning.”
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19. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or more of the following methods individually or in combination:¹

- a) A warning that appears on a product's label or other labeling.
- b) Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof.
- c) The warnings provided pursuant to subparagraphs (a) and (b) shall be prominently placed upon a product's labels or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.
- d) A system of signs, public advertising identifying the system and toll-free information services, or any other system that provides clear and reasonable warnings.

20. Proposition 65 provides that any “person who violates or threatens to violate” the statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

FACTUAL BACKGROUND

21. On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a chemical known to the State to cause cancer and reproductive toxicity.

¹ Alternatively, a person in the course of doing business may elect to comply with the warning requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30, 2016, and operative on August 30, 2018.

1 22. The consumer exposures that are the subject of this First Amended Complaint result
2 from through dermal absorption. Dermal absorption of DEHP can occur through direct skin contact
3 with the Products during routine use when grasped, opened, or manipulated with bare hands. If the
4 Products become wet due to contact with water and is handled or held in contact with wet skin,
5 aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP permeation.
6 Concentrations of DEHP can be expected to build within the Products. This gas phase and surface
7 DEHP can absorb to the surface of the Products, which can subsequently be handled, held in direct
8 contact with skin, mouthed, or ingested by the user. If the Products are stored or transported in a
9 carrier, DEHP that leaches from the Products may contaminate other articles contained within the
10 storage area or carrier that are subsequently handled, worn, mouthed, or ingested by the user.
11 Finally, while mouthing of the Products does not seem likely, some amount of exposure through
12 ingestion can occur by handling the product with subsequent touching of the user's hand to mouth.

13 23. Defendants have manufactured, processed, marketed, distributed, offered to sell
14 and/or sold the Products in California since at least January 30, 2019. The Products continue to be
15 distributed and/or sold in California without the requisite warning information.

16 24. At all times relevant to this action, Defendants have knowingly and intentionally
17 exposed users, consumers and/or patients to the Products and the Listed Chemical without first
18 giving a clear and reasonable exposure warning to such individuals.

19 25. As a proximate result of acts by Defendants, as persons in the course of doing
20 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
21 California, including in Alameda County, have been exposed to the Listed Chemical without a
22 clear and reasonable warning on the Products. The individuals subject to the violative exposures
23 include normal and foreseeable users, consumers and patients that use the Products, as well as all
24 others exposed to the Products

25 **SATISFACTION OF NOTICE REQUIREMENTS**

26 26. On January 30, 2019, Plaintiff gave notice of alleged violation of Health and Safety
27 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
28 DEHP contained in the Products without proper warning, subject to a private action to Defendants

1 and to the California Attorney General's office and the offices of the County District attorneys and
2 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
3 violations allegedly occurred.

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

9 28. After receiving the Notice, and to Plaintiff's best information and belief, none of
10 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
11 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
12 are the subject of the Notice.

13 29. Plaintiff is commencing this action more than sixty (60) days from the date of the
14 Notice to Defendant, as required by law.

15 **FIRST CAUSE OF ACTION**

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

17 30. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 29 of
18 this complaint as though fully set forth herein.

19 31. Defendants have, at all times mentioned herein, acted as either a manufacturer,
20 distributor and/or retailer of the Products.

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

23 33. Products do not comply with the Proposition 65 warning requirements.

24 34. Plaintiff, based on his best information and belief, avers that at all relevant times
25 herein, and at least since January 30, 2019, continuing until the present, that Defendants have
26 continued to knowingly and intentionally expose California users and consumers of the Products
27 to DEHP without providing required warnings under Proposition 65.

1 35. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling and recommended use of the Products. Consequently, the primary route of
3 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can occur
4 through direct skin contact with the Products during routine use when grasped, opened, or
5 manipulated with bare hands. If the Products become wet due to contact with water and is handled
6 or held in contact with wet skin, aqueous DEHP skin permeation rates have been reported to be
7 faster than neat DEHP permeation. Concentrations of DEHP can be expected to build within the
8 Products. This gas phase and surface DEHP can absorb to the surface of the Products, which can
9 subsequently be handled, held in direct contact with skin, mouthed, or ingested by the user. If the
10 Products are stored or transported in a carrier, DEHP that leaches from the Products may
11 contaminate other articles contained within the storage area or carrier that are subsequently
12 handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the Products does not
13 seem likely, some amount of exposure through ingestion can occur by handling the product with
14 subsequent touching of the user's hand to mouth.

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

18 37. Defendants have knowledge that the normal and reasonably foreseeable use of the
19 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
20 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale
21 and offering of the Products to consumers in California.

22 38. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
23 First Amended Complaint.

24 39. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
25 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation
26 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) for each
27 unlawful exposure to the Listed Chemicals contained in the Products. Each exposure discovered
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1 within one year of commencing this action subjects Defendants to a separate and additional penalty
2 under H&S Code § 25249.7(b).

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

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
7 relief:

- 8 A. That the court assess civil penalties against Defendants in the amount of \$2,500 per
9 day for each violation for up to 365 days (up to a maximum civil penalty amount
10 per violation of \$912,000.00) in accordance with Health and Safety Code §
11 25249.7(b);
- 12 B. That the court preliminarily and permanently enjoin Defendants mandating
13 Proposition 65 compliant warnings on the Product;
- 14 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
15 amount of \$50,000.00.
- 16 D. That the court grant any further relief as may be just and proper.

17 Dated: June 24, 2020

BRODSKY & SMITH, L.L.C.

18 By: 
19 Evan J. Smith (SBN242352)
20 Ryan P. Cardona (SBN302113)
21 9595 Wilshire Boulevard, Suite 900
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25 *Attorneys for Plaintiff*

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8 *Attorneys for Plaintiff*

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 ANTHONY FERREIRO,

13 Plaintiff,

14 vs.

15 ROSS STORES, INC.,

16 Defendant.

Case No.: RG19041441

Dept.: 15

Judge: Evelio Grillo

PROOF OF MAILING

17 I, Evan J. Smith, Esquire, declare:

18 I am over the age of 18 years and not a party to this action; my business address is 9595
19 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212 and 333 E. City Avenue, Suite 510, Bala
Cynwyd, PA 19004.

20 On June 24, 2020, I served the following document(s):

21 **(1) FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE**
22 **RELIEF – VIOLATION OF HEALTH & SAFETY CODE § 25249.5;**

23 by serving a true copy of the above-described document in the following manner:

24 **BY ELECTRONIC MAIL DELIVERY**

25 The above-described documents were transmitted via Electronic Mail Delivery to the following
26 parties on June 24, 2020:

27
28
- 1 -
PROOF OF MAILING

Filed By Fax

1 Ross Stores, Inc.
2 C/o CT Corporation System, Person
3 Authorized to Accept Service
4 818 West Seventh Street
Suite 930
Los Angeles, CA 90017

5 *Defendant*

Spicebox Product Development, Ltd.
12171 Horseshoe Way
Richmond, British Columbia, V7A 4V4,
Canada

Defendant

6
7 I declare under penalty of perjury under the laws of California and of the United States of America
that the above is true and correct.

8 Executed on June 24, 2020, at Bala Cynwyd, Pennsylvania.
9

10
11
12 Evan J. Smith

