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**ENDORSED  
FILED**  
*San Francisco County Superior Court*

**MAY 14 2020**

**CLERK OF THE COURT**  
**BY: ANGELICA SUNGA**  
*Deputy Clerk*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 WALMART, INC.,

15 Defendant.

Case No.: **CGC-20-584451**

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

**BY FAX**

16 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following  
17 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 at  
21 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 Pen&Gear badge holders/pouches, Wacces exercise ball kits/sets, and ornament chests/boxes sold  
and/or distributed by defendant Walmart, Inc. ("Walmart" or the "Defendant") in California.

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

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

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

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

18           6.       Plaintiff alleges that Defendant distributes and/or offers for sale in California,  
19 without a requisite exposure warning, Pen&Gear badge holders/pouches, Wacces exercise ball  
20 kits/sets, and ornament chests/boxes (the “Products”) that expose persons to DEHP.

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

25           8.       Plaintiff seeks civil penalties against Defendant for its violations of Proposition 65  
26 in accordance with Health and Safety Code § 25249.7(b).

27           9.       Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
28 Defendant to provide purchasers or users of the Products with required warnings related to the

1 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code  
2 § 25249.7(a).

3 10. Plaintiff further seeks a reasonable award of attorney’s fees and costs.

4 **PARTIES**

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

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

12 13. Plaintiff alleges that Defendant Walmart 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 14. Venue is proper in the County of San Francisco because one or more of the  
16 instances of wrongful conduct occurred, and continue to occur in this county and/or because  
17 Defendant conducted, and continues to conduct, business in the County of San Francisco with  
18 respect to the Products.

19 15. 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 enforcement  
22 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has  
23 jurisdiction over this lawsuit.

24 16. This Court has jurisdiction over Defendant because Defendant is either a citizen of  
25 the State of California, has sufficient minimum contacts with the State of California, is registered  
26 with the California Secretary of State as foreign corporations authorized to do business in the State  
27 of California, and/or has otherwise purposefully availed itself of the California market. Such  
28

1 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and  
2 permissible with traditional notions of fair play and substantial justice.

3 **STATUTORY BACKGROUND**

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

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

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

13 19. An exposure to a chemical in a consumer product is one “which results from a  
14 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a  
15 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §  
16 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...  
17 shall provide a warning to any person to whom the product is sold or transferred unless the product  
18 is packaged or labeled with a clear and reasonable warning.”

19 20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or  
20 more of the following methods individually or in combination:<sup>1</sup>

- 21 a. A warning that appears on a product’s label or other labeling.
- 22 b. Identification of the product at the retail outlet in a manner which provides a  
23 warning. Identification may be through shelf labeling, signs, menus, or a  
24 combination thereof.
- 25 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be  
26 prominently placed upon a product’s labels or other labeling or displayed at the  
27 retail outlet with such conspicuousness, as compared with other words,

28 <sup>1</sup> 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 statements, designs, or devices in the label, labeling or display as to render it  
2 likely to be read and understood by an ordinary individual under customary  
conditions of purchase or use.

- 3 d. A system of signs, public advertising identifying the system and toll-free  
4 information services, or any other system that provides clear and reasonable  
5 warnings.

6 21. Proposition 65 provides that any “person who violates or threatens to violate” the  
7 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase  
8 “threaten to violate” is defined to mean creating “a condition in which there is a substantial  
9 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil  
10 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to  
11 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

#### 12 **FACTUAL BACKGROUND**

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

19 23. The consumer exposures that are the subject of this Complaint result from through  
20 dermal absorption. Users may be exposed to DEHP by dermal absorption through direct skin  
21 contact with the Products during routine use when the Products are manipulated with bare hands.  
22 If the Products are handled with wet hands, aqueous DEHP skin permeation rates have been  
23 reported to be faster than neat DEHP permeation. Concentrations of gas phase DEHP can be  
24 expected to build within the Products. This gas phase DEHP can potentially be absorbed to the  
25 surface of the interior contents. When handled with bare hands, these Products can provide an  
26 indirect source of dermal transfer of DEHP. If the Products are stored or transported in a carrier,  
27 DEHP that leaches from the Products may contaminate other articles contained within these closed  
28 spaces that are subsequently handled, worn, mouthed, or ingested by the user. Finally, while

1 mouthing of the Products does not seem likely, some amount of exposure through ingestion can  
2 occur by touching the Products with subsequent touching of the user's hand to mouth.

3 24. Defendant has processed, marketed, distributed, offered to sell and/or sold the  
4 Products in California since at least May 15, 2019 (Waces exercise ball kits/sets), May 20, 2019  
5 (ornament chests/boxes), and May 21, 2019 (Pen&Gear badge holders/pouches). The Products  
6 continue to be distributed and sold in California without the requisite warning information.

7 25. At all times relevant to this action, Defendant has knowingly and intentionally  
8 exposed users, consumers and/or patients to the Products and the Listed Chemical without first  
9 giving a clear and reasonable exposure warning to such individuals.

10 26. As a proximate result of acts by Defendant, as a person in the course of doing  
11 business within the meaning of H&S Code § 25249.11, individuals throughout the State of  
12 California, including in San Francisco County, have been exposed to the Listed Chemical without  
13 a clear and reasonable warning on the Products. The individuals subject to the violative exposures  
14 include normal and foreseeable users, consumers and patients that use the Products, as well as all  
15 others exposed to the Products.

16 **SATISFACTION OF NOTICE REQUIREMENTS**

17 27. On May 15, 2019 (Waces exercise ball kits/sets), May 20, 2019 (ornament  
18 chests/boxes), and May 21, 2019 (Pen&Gear badge holders/pouches), respectively, Plaintiff gave  
19 notice of alleged violation of Health and Safety Code § 25249.6 (the "Notices") to Defendant  
20 concerning the exposure of California citizens to DEHP contained in the Products without proper  
21 warning, subject to a private action to Defendant and to the California Attorney General's office  
22 and the offices of the County District attorneys and City Attorneys for each city with a population  
23 greater than 750,000 persons wherein the herein violations allegedly occurred.

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

1 29. After receiving the Notices, and to Plaintiff's best information and belief, none of  
2 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a  
3 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are  
4 the subject of the Notice.

5 30. Plaintiff is commencing this action more than sixty (60) days from the date of the  
6 Notices to Defendant, as required by law.

7 **FIRST CAUSE OF ACTION**

8 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

9 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of  
10 this complaint as though fully set forth herein.

11 32. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of  
12 the Product.

13 33. The Products contain DEHP, a hazardous chemical found on the Proposition 65 list  
14 of chemicals known to be hazardous to human health.

15 34. The Products do not comply with the Proposition 65 warning requirements.

16 35. Plaintiff, based on his best information and belief, avers that at all relevant times  
17 herein, and at least since May 15, 2019 (Waccex exercise ball kits/sets), May 20, 2019 (ornament  
18 chests/boxes), and May 21, 2019 (Pen&Gear badge holders/pouches), continuing until the present,  
19 that Defendant has continued to knowingly and intentionally expose California users and  
20 consumers of the Product to DEHP without providing required warnings under Proposition 65.

21 36. The exposures that are the subject of the Pen&Gear badge holder notice result from  
22 the purchase, acquisition, handling and recommended use of the badge holder. Consequently, the  
23 primary route of exposure to these chemicals is through dermal absorption. Users may be exposed  
24 to DEHP by dermal absorption through direct skin contact with the Products when grasped with  
25 bare hands to extend or retract the Products. If the Products become wet due to precipitation or is  
26 handled with wet hands, aqueous DEHP skin permeation rates have been reported to be faster than  
27 neat DEHP permeation. If the Products are stored or transported in a carrier, DEHP that leaches  
28 from the Products may contaminate other articles contained within these closed spaces are

1 subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the Products does  
2 not seem likely, some amount of exposure through ingestion can occur by touching the Products  
3 with subsequent touching of the user's hand to mouth.

4 37. The exposures that are the subject of the ornament chests/boxes notice result from  
5 the purchase, acquisition, handling and recommended use of the chests/boxes. Consequently, the  
6 primary route of exposure to these chemicals is through dermal absorption. Users may be exposed  
7 to DEHP by dermal absorption through direct skin contact with the Products during routine use  
8 when the Products are manipulated with bare hands. Concentrations of DEHP can be expected to  
9 build within the enclosed, interior of the Products. DEHP from the Products can absorb to the  
10 surface of contents, that are subsequently handled, worn, mouthed, or ingested by the user. Finally,  
11 while mouthing of the Products does not seem likely, some amount of exposure through ingestion  
12 can occur by touching the product with subsequent touching of the user's hand to mouth.

13 38. The exposures that are the subject of the exercise ball kits notice result from the  
14 purchase, acquisition, handling and recommended use of the exercise ball kits. Consequently, the  
15 primary route of exposure to these chemicals is through dermal absorption. Users can be exposed  
16 to DEHP by dermal absorption through direct skin contact with the Products during routine use  
17 when the Products contact with bare skin. If the Products are handled with wet hands or comes  
18 into contact with wet skin due to perspiration when exercising, DEHP skin permeation rates from  
19 aqueous solutions are faster than neat DEHP permeation. When the Products come into contact  
20 with clothing during exercise, DEHP from the Products can absorb to clothes and these clothes  
21 will become a source of dermal exposure to DEHP. Finally, while direct mouthing of the Products  
22 does not seem likely, some amount of exposure through ingestion can occur by touching the  
23 product with subsequent touching of the user's hand to mouth.

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

27 40. Defendant has knowledge that the normal and reasonably foreseeable use of the  
28 Products expose individuals to DEHP, and Defendant intends that exposures to DEHP will occur



1 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of  
2 the Products to consumers in California

3 41. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
4 Complaint.

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

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

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following  
11 relief:

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

21 Dated: May 13, 2020

BRODSKY & SMITH, LLC

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

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