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COUNTY OF SAN FRANCISCO
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ANTHONY FERREIRO,

Plaintiff,

vs.

LOWE'S COMPANIES, INC.,

Defendant.

Case No.: CGC-20-585519

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF

(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.

BY FAX

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 BlueHawk log chains sold and/or distributed by defendant Lowe's Companies, Inc. ("Lowe's" or the "Defendant") in California.

3. DEHP is a harmful chemical known to the State of California to cause cancer and reproductive toxicity. 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.

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

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

6. Plaintiff alleges that Defendant distributes and/or offers for sale in California, without a requisite exposure warning, BlueHawk log chains (the "Products") that expose persons to DEHP.

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

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

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendant 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).

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

PARTIES

11. 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).

12. Defendant Lowe's, 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.

13. Plaintiff alleges that defendant Lowe's 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

14. Venue is proper in the County of San Francisco because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendant conducted, and continues to conduct, business in the County of San Francisco with respect to the Products.

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

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

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

STATUTORY BACKGROUND

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

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

> No 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...

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

20. 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.

[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.

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.

21. 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

22. 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.

23. The consumer exposures that are the subject of this Complaint result from through dermal absorption. Users can be exposed to DEHP by dermal absorption through direct skin contact with the clear plastic during routine use when the Products are handled with bare hands. If the Products become wet due to contact with water and are handled or held in contact with wet skin, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP permeation. Concentrations of DEHP can be expected to build within the interior of the Products. This gas phase and surface DEHP can absorb to the surface of the interior contents, that can be subsequently handled by the user. If the Products are stored or transported in a carrier, DEHP that

leaches from the Products may contaminate other articles contained within these closed spaces are subsequently handled, worn, mouthed, or consumed. Finally, while direct mouthing of the Products does not seem likely, some amount of exposure through ingestion can occur by touching the Products with subsequent touching of the user's hand to mouth.

24. Defendant has supplied, processed, marketed, distributed, offered to sell and/or sold the Products in California since at least October 28, 2019. The Products continue to be distributed and sold in California without the requisite warning information.

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

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

SATISFACTION OF NOTICE REQUIREMNTS

27. On October 28, 2019, Plaintiff gave notice of alleged violation of Health and Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to DEHP contained in the Products without proper warning, subject to a private action to Defendant and to the California Attorney General's office and the offices of the County District attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein the herein violations allegedly occurred.

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

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

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

FIRST CAUSE OF ACTION

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

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

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

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

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

35. Plaintiff, based on his best information and belief, avers that at all relevant times herein, and at least since October 28, 2019, continuing until the present, that Defendant has continued to knowingly and intentionally expose California users and consumers of the Product to DEHP without providing required warnings under Proposition 65.

36. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the Product. Consequently, the primary route of exposure to these chemicals is through dermal absorption. Users can be exposed to DEHP by dermal absorption through direct skin contact with the clear plastic during routine use when the Products are handled with bare hands. If the Products become wet due to contact with water and are handled or held in contact with wet skin, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP permeation. Concentrations of DEHP can be expected to build within the interior of the Products. This gas phase and surface DEHP can absorb to the surface of the interior contents, that can be subsequently handled by the user. If the Products are

stored or transported in a carrier, DEHP that leaches from the Products may contaminate other articles contained within these closed spaces are subsequently handled, worn, mouthed, or consumed. Finally, while direct mouthing of the Products does not seem likely, some amount of exposure through ingestion can occur by touching the Products with subsequent touching of the user's hand to mouth.

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

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

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

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

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

PRAYER FOR RELIEF

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

A. That the court assess civil penalties against each Defendant in the amount of $2,500 per day for each violation for up to 365 days (up to a maximum civil penalty amount per violation of $912,000.00) in accordance with Health and Safety Code § 25249.7(b);

B. That the court preliminarily and permanently enjoin Defendant mandating Proposition 65 compliant warnings on the Products;

C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the amount of $50,000.00.

D. That the court grant any further relief as may be just and proper.

Dated: July 14, 2020

BRODSKY & SMITH, LLC

By:_____

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