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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
BY P. Tamm DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOZA,

Plaintiff,

vs.

GREENBRIER INTERNATIONAL,
INC., DOLLAR TREE STORES, INC.,

Defendants.

Case No.: RB 20080794

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

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

Plaintiff Gabriel Espinoza ("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 Diisononyl phthalate (DINP), a toxic chemical found in Lisheng
zipper pouches/cases sold and/or distributed by defendant Greenbrier International, Inc.

1 (“Greenbrier”) and defendant Dollar Tree Stores, Inc. (“Dollar Tree”) (collectively, “Defendants”)
2 in California.

3 3. DINP is a harmful chemical known to the State of California to cause cancer and
4 reproductive toxicity. On December 20, 2013, the State of California listed DINP as a chemical
5 known to the State to cause cancer and it has come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 25249.10(b).

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

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

19 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
20 without a requisite exposure warning, Lisheng zipper pouches/cases (the “Products”) that expose
21 persons to DINP.

22 7. Defendants’ failure to warn consumers and other individuals in California of the
23 health hazards associated with exposure to DINP 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 civil
25 penalties described herein.

26 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
27 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 DINP pursuant to Health and Safety Code § 25249.7(a).

PARTIES

12. Defendant Greenbrier, 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 Greenbrier 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

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

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

3 16. 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 17. 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 18. 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 any
17 individual to a chemical known to the state to cause cancer or reproductive toxicity without
18 first giving clear and reasonable warning to such individual...

19 19. An exposure to a chemical in a consumer product is one “which results from a
20 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
21 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
22 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
23 shall provide a warning to any person to whom the product is sold or transferred unless the product
24 is packaged or labeled with a clear and reasonable warning.”
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26
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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.
- 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 December 20, 2013, the State of California listed DINP 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). In summary, the Listed Chemical was listed under Proposition 65 as a chemical known to the State to cause cancer.

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 23. The consumer exposures that are the subject of this Complaint result from through
2 dermal absorption. Users can be exposed to DINP by dermal absorption through direct skin contact
3 with the Products during routine use when contacted with bare hands. Concentrations of DINP can
4 be expected to build within the interior of the Products. This DINP can absorb to the surface of the
5 interior contents that are subsequently handled, mouthed, or ingested by the user. If the Products
6 are stored or transported in a carrier, DINP that leaches from the Products may contaminate other
7 articles contained within these closed spaces are subsequently handled, worn, mouthed, or
8 consumed. Finally, while mouthing of the Products does not seem likely, some amount of exposure
9 through ingestion can occur by touching the Products with subsequent touching of the user's hand
10 to mouth.

11 24. Defendants have distributed, processed, marketed, offered to sell and/or sold the
12 Products in California since at least February 7, 2020. The Products continue to be distributed and
13 sold in California without the requisite warning information.

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

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

23 **SATISFACTION OF NOTICE REQUIREMENTS**

24 27. On February 7, 2020, Plaintiff gave notice of alleged violation of Health and Safety
25 Code § 25249.6 (the "Notices") to Defendants concerning the exposure of California citizens to
26 DINP contained in the Products without proper warning, subject to a private action to Defendants
27 and to the California Attorney General's office and the offices of the County District attorneys and
28

1 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
2 violations allegedly occurred.

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

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

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

14 **FIRST CAUSE OF ACTION**

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

16 31. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
17 this complaint as though fully set forth herein.

18 32. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
19 of the Product.

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

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

23 35. Plaintiff, based on his best information and belief, avers that at all relevant times
24 herein, and at least since February 7, 2020, continuing until the present, that Defendants have
25 continued to knowingly and intentionally expose California users and consumers of the Product to
26 DINP without providing required warnings under Proposition 65.

27 36. The exposures that are the subject of the Notice result from the purchase,
28 acquisition, handling and recommended use of the Products. Consequently, the primary route of

1 exposure to these chemicals is through dermal absorption. Users can be exposed to DINP by
2 dermal absorption through direct skin contact with the Products during routine use when contacted
3 with bare hands. Concentrations of DINP can be expected to build within the interior of the
4 Products. This DINP can absorb to the surface of the interior contents that are subsequently
5 handled, mouthed, or ingested by the user. If the Products are stored or transported in a carrier,
6 DINP that leaches from the Products may contaminate other articles contained within these closed
7 spaces are subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the
8 Products does not seem likely, some amount of exposure through ingestion can occur by touching
9 the Products with subsequent touching of the user's hand to mouth.

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

13 38. Defendants have knowledge that the normal and reasonably foreseeable use of the
14 Product exposes individuals to DINP, and Defendants intend that exposures to DINP will occur
15 by their deliberate, non-accidental participation in the importation, distribution, sale and offering
16 of the Products to consumers in California

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

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

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

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
25 relief:

- 26 A. That the court assess civil penalties against each Defendant in the amount of \$2,500
27 per day for each violation for up to 365 days (up to a maximum civil penalty amount
28

1 per violation of \$912,000.00) in accordance with Health and Safety Code §
2 25249.7(b);

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

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

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

8
9 Dated: November 17, 2020

BRODSKY & SMITH, LLC

10 By:  _____

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