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ENDORSED  
FILED  
ALAMEDA COUNTY  
FEB 22 2021

CLERK OF THE SUPERIOR COURT  
By Alex R. Kosenko Jr, Deputy

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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 KAPLAN EARLY LEARNING  
COMPANY,

Defendant.

Case No.: **RG 21090223**

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

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

17 **BACKGROUND OF THE CASE**

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

24 2. This complaint is a representative action brought by Plaintiff in the public interest  
25 of the citizens of the State of California to enforce the People's right to be informed of the health  
26 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
27 Kaplan learning kits sold and/or distributed by defendant Kaplan Early Learning Company  
28 ("Kaplan" or the "Defendant") in California.

Filed By Fax

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, Kaplan learning kits (the “Products”) that expose persons to  
20 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. She brings this  
8 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

9 12. Defendant Kaplan, 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 Kaplan is a "person" in the course of doing business  
13 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 Alameda because one or more of the instances of  
16 wrongful conduct occurred, and continue to occur in this county and/or because Defendant  
17 conducted, and continues to conduct, business in the County of Alameda with respect to the  
18 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  
23 a warning. Identification may be through shelf labeling, signs, menus, or a combination  
24 thereof.

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26  
27 <sup>1</sup> Alternatively, a person in the course of doing business may elect to comply with the warning  
28 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 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be  
2 prominently placed upon a product's labels or other labeling or displayed at the retail outlet  
3 with such conspicuousness, as compared with other words, statements, designs, or devices  
4 in the label, labeling or display as to render it likely to be read and understood by an  
5 ordinary individual under customary conditions of purchase or use.

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

8 21. Proposition 65 provides that any "person who violates or threatens to violate" the  
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase  
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial  
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil  
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to  
13 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

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

21 23. The consumer exposures that are the subject of this Complaint result from through  
22 dermal absorption. Dermal absorption of DEHP can occur through direct skin contact when the  
23 Products are contacted with bare hands or if the Products are worn directly against bare skin.  
24 Articles placed in the Products, can absorb DEHP that can subsequently be handled, mouthed, or  
25 ingested by the user resulting in exposure to DEHP. If the Products are stored or transported in a  
26 carrier, DEHP that leaches from the Products may contaminate other articles contained within  
27 these closed spaces that are subsequently handled, worn, mouthed, or ingested by the user. Finally,  
28

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

3 24. Defendant has manufactured, processed, marketed, distributed, offered to sell  
4 and/or sold the Products in California since at least February 24, 2020. The Products continue to  
5 be distributed and sold in California without the requisite warning information.

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

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

15 **SATISFACTION OF NOTICE REQUIREMENTS**

16 27. On February 24, 2020, Plaintiff gave notice of alleged violation of Health and  
17 Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens  
18 to DEHP contained in the Products without proper warning, subject to a private action to Defendant  
19 and to the California Attorney General's office and the offices of the County District attorneys and  
20 City Attorneys for each city with a population greater than 750,000 persons wherein the herein  
21 violations allegedly occurred.

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

27 29. After receiving the Notice, and to Plaintiff's best information and belief, none of  
28 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a

1 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are  
2 the subject of the Notice.

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

5 **FIRST CAUSE OF ACTION**

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

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

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

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

13 34. The Product does not comply with the Proposition 65 warning requirements.

14 35. Plaintiff, based on his best information and belief, avers that at all relevant times  
15 herein, and at least since February 24, 2020, continuing until the present, that Defendant has  
16 continued to knowingly and intentionally expose California users and consumers of the Product to  
17 DEHP without providing required warnings under Proposition 65.

18 36. The exposures that are the subject of the Notice result from the purchase,  
19 acquisition, handling and recommended use of the Products. Consequently, the primary route of  
20 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can occur  
21 through direct skin contact when the Products are contacted with bare hands or if the Products are  
22 worn directly against bare skin. Articles placed in the Products, can absorb DEHP that can  
23 subsequently be handled, mouthed, or ingested by the user resulting in exposure to DEHP. If the  
24 Products are stored or transported in a carrier, DEHP that leaches from the Products may  
25 contaminate other articles contained within these closed spaces that are subsequently handled,  
26 worn, mouthed, or ingested by the user. Finally, while mouthing of the Products does not seem  
27 likely, some amount of exposure through ingestion can occur by touching the Products with  
28 subsequent touching of the user's hand to mouth.

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

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

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

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

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

14 **PRAYER FOR RELIEF**

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

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

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

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

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

25 Dated: February 22, 2021

BRODSKY & SMITH, LLC

26 By: \_\_\_\_\_

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