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**ELECTRONICALLY
FILED**

*Superior Court of California,
County of San Francisco*

**08/19/2021
Clerk of the Court**

**BY: RONNIE OTERO
Deputy Clerk**

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 CITY AND COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION

15 MY NGUYEN,

16 Plaintiff,

17 v.

18 XIT, INC.; PHOTO 4 LESS, INC.;
19 WALMART, INC.; and DOES 1-30,
20 inclusive,

21 Defendants.

Case No.

CGC-21-594623

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

Violation of Proposition 65,
The Safe Drinking Water and Toxic
Enforcement Act of 1986
(Health & Safety Code § 25249.5 *et seq.*)

UNLIMITED CIVIL

1 Plaintiff MY NGUYEN, acting in the public interest, alleges a cause of action against
2 DEFENDANTS XIT, INC., PHOTO 4 LESS, INC., WALMART, INC., and DOES 1-30.

3 **INTRODUCTION AND NATURE OF THE ACTION**

4 1. This Complaint is a representative action brought by plaintiff MY NGUYEN in the
5 public interest of the citizens of the State of California to enforce the People’s right to be informed of
6 the health hazards caused by exposures to di(2-ethylhexyl)phthalate (“DEHP”), a toxic chemical
7 found in and on the photo albums sold by defendants in the State of California.

8 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn
9 individuals not covered by California’s Occupational Safety Health Act, Labor Code § 6300 *et seq.*
10 they are being exposed to substances known to the State of California to cause birth defects and other
11 reproductive harm through exposures to DEHP, present in and on photo albums manufactured,
12 distributed, imported, sold and otherwise offered for sale or use throughout the State of California by
13 defendants.

14 3. Detectable levels of DEHP are found in and on the photo albums defendants
15 manufacture, import, sell or distribute for sale to individuals throughout the State of California.

16 4. Pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
17 Health and Safety Code § 25249.6 *et seq.* (“**Proposition 65**”), it is unlawful for a person in the course
18 of doing business to knowingly and intentionally expose consumers in California to chemicals known
19 to the State to cause birth defects or other reproductive harm, without first providing a “clear and
20 reasonable” health hazard warning to such individuals prior to purchase or use.

21 5. MY NGUYEN contends and alleges defendants manufacture, distribute, import, sell,
22 and offer for sale, in or into California, photo albums containing DEHP without Proposition 65’s
23 requisite health hazard warning about the presence of, and the harms associated with exposures to,
24 the chemical, including, but not limited to, *XIT Pieces of Moment, Ice Blue Photo Album for Fuji*
25 *Instax Mini Prints, Model #XFTA128BL, UPC #6 39790 94537 8* (collectively referred to,
26 hereinafter, as the “**PRODUCTS**”). Defendants’ conduct subjects them to civil penalties for each
27 violation, as well an injunction and preliminary and permanent injunctive relief. Health & Safety
28 Code §§ 25249.7(a) and (b).

1 **PARTIES**

2 1. Plaintiff MY NGUYEN is a citizen of the state of California seeking to eliminate toxic
3 chemicals in consumer products, to increase public awareness of those chemicals and to promote
4 corporate responsibility. MY NGUYEN is a person within the meaning of Health & Safety Code
5 § 25249.11(a) and brings this action in the public interest pursuant to Health and Safety Code
6 § 25249.7(d).

7 2. Plaintiff is informed, believes and thereon alleges that, at all relevant times,
8 Defendant XIT, INC. was and is a person in the course of doing business, with ten (10) or more
9 employees, within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

10 3. XIT, INC. manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
11 sale or use in the State of California, or implies by its conduct that it manufactures, imports,
12 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

13 4. Plaintiff is informed, believes and thereon alleges that, at all relevant times,
14 Defendant PHOTO 4 LESS, INC. was and is a person in the course of doing business, with ten (10)
15 or more employees, within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

16 5. PHOTO 4 LESS, INC. manufactures, imports, distributes, sells, and/or offers the
17 PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures,
18 imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

19 6. Plaintiff is informed, believes and thereon alleges that, at all relevant times,
20 Defendant WALMART, INC. was and is a person in the course of doing business, with ten (10) or
21 more employees, within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

22 7. WALMART, INC. imports, distributes, sells, and/or offers the PRODUCTS for sale
23 or use in the State of California, or implies by its conduct that it manufactures, imports, distributes,
24 sells, and/or offers the PRODUCTS for sale or use in the State of California.

25 8. Defendants DOES 1-10 (“**MANUFACTURER DEFENDANTS**”) are each a person
26 in the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
27 25249.11. MANUFACTURER DEFENDANTS, and each of them, assemble, fabricate, and
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1 manufacture, or each impliedly does so by its conduct, one or more of the PRODUCTS offered for
2 sale or use in California.

3 9. Defendants DOES 11-20 (“**DISTRIBUTOR DEFENDANTS**”) are each a person in
4 the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.
5 DISTRIBUTOR DEFENDANTS, and each of them, distribute, transfer, and transport, or each
6 impliedly does so by its conduct, one or more of the PRODUCTS to individuals, businesses, or
7 retailers for sale or use in the State of California

8 10. Defendants DOES 21-30 (“**RETAILER DEFENDANTS**”) are each a person in the
9 course of doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.
10 RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to individuals in the
11 State of California.

12 11. At this time, the true names of Defendants DOES 1 through 30, inclusive, are
13 unknown to plaintiff, who, therefore, sues said DEFENDANTS by their fictitious names, pursuant to
14 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, each of
15 the fictitiously named Defendants is responsible in some manner for the acts and occurrences alleged
16 herein and the damages caused thereby. When ascertained, their true names and capacities shall be
17 reflected in an amended complaint.

18 12. At all times mentioned herein, XIT, INC., PHOTO 4 LESS, INC., WALMART,
19 INC., MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER
20 DEFENDANTS shall, hereinafter, where appropriate, be referred to collectively as the
21 “**DEFENDANTS.**”

JURISDICTION AND VENUE

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23 13. This Court has jurisdiction over this action pursuant to Cal. Health & Safety Code
24 § 25249.7, allowing enforcement by any court of competent jurisdiction. The California Superior
25 Court has jurisdiction over this action pursuant to California Constitution Article VI, section 10,
26 which grants the Superior Court “original jurisdiction in all causes except those given by statute to
27 other trial courts.” The statute under which this action is brought does not specify any other basis of
28 subject matter jurisdiction.

1 14. The California Superior Court has jurisdiction over DEFENDANTS based on
2 plaintiff's information and good faith belief that DEFENDANTS are each a person, firm, corporation
3 or association that is a citizen of the State of California, does sufficient business in California, have
4 sufficient minimum contacts in California, and/or otherwise purposefully and intentionally avail
5 themselves of the California market through their manufacture, importation, distribution, promotion,
6 marketing or sale of PRODUCTS within the State. DEFENDANTS' purposeful availment renders
7 the exercise of personal jurisdiction by California courts consistent with traditional notions of fair
8 play and substantial justice.

9 15. Venue is proper in the Superior Court for the City and County of San Francisco
10 pursuant to Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of
11 competent jurisdiction, because plaintiff seeks civil penalties against DEFENDANTS, because one
12 or more instances of wrongful conduct occurred, and continue to occur, in this county, and/or
13 because DEFENDANTS conducted, and continue to conduct, business in the city and county of San
14 Francisco with respect to the PRODUCTS that are the subject of this action.

15 **REGULATORY BACKGROUND AND LAW**

16 16. In 1986, the people of the State of California approved an initiative addressing
17 concerns regarding the harms caused by hazardous chemicals and declaring their right “[t]o be
18 informed about exposures the chemicals that cause cancer, birth defects, or other reproductive harm.”
19 Ballot Pamp., Proposed General Law, Gen. Elec. (Nov. 4, 1986) at p.3.

20 17. Formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986 and
21 codified at Health & Safety Code §§ 25249.6 *et seq.*, Proposition 65 states in relevant part that “[n]o
22 person in the course of doing business shall knowingly and intentionally expose any individual to a
23 chemical known to cause cancer or reproductive toxicity without first giving a clear and reasonable
24 warning to such individual...”

25 18. Under the Act, a “person the course of doing business” is defined as a business with
26 ten (10) or more employees. Health & Safety Code § 25249.11(b). Businesses are prohibited from
27 exposing individuals to hazardous chemicals without first giving a “clear and reasonable” health
28 hazard warning. Health & Safety Code § 25249.6

1 use of the PRODUCTS without first receiving a “clear and reasonable warning,” as required by
2 Proposition 65.

3 26. After receiving plaintiff’s Notice, no public enforcement agency has commenced and
4 is diligently prosecuting a cause of action against DEFENDANTS under Proposition 65 to enforce
5 the alleged violations that are the subject of the Notice.

6 **FIRST CAUSE OF ACTION**

7 **(Violation of Proposition 65 - Against All DEFENDANTS)**

8 27. MY NGUYEN realleges and incorporates by reference, as if fully stated herein, the
9 allegations set forth in Paragraphs 1 through 26, inclusive.

10 28. DEFENDANTS’ PRODUCTS contain DEHP in levels requiring a clear and
11 reasonable warning under Proposition 65.

12 29. DEFENDANTS knew or should have known the PRODUCTS they manufacture,
13 import, distribute, sell, and offer for sale in California contain DEHP. Plaintiff’s Notice also
14 informed DEFENDANTS of the presence of DEHP in the PRODUCTS.

15 30. The PRODUCTS DEFENDANTS manufacture, import, distribute, sell, and offer for
16 sale or use in California cause exposures to DEHP, as a result of the reasonably foreseeable use of the
17 PRODUCTS, through dermal contact and/or ingestion.

18 31. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
19 continues to cause, exposures to DEHP.

20 32. DEFENDANTS know the normal and reasonably foreseeable use of the PRODUCTS
21 exposes individuals to DEHP through dermal contact and/or ingestion.

22 33. DEFENDANTS intend exposures to DEHP from the reasonably foreseeable use of the
23 PRODUCTS will occur by their deliberate, non-accidental participation in the California
24 marketplace.

25 34. The exposures to DEHP, caused by DEFENDANTS and endured by consumers and
26 other individuals in California, are not exempt from the “clear and reasonable” warning requirements
27 of Proposition 65.

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1 35. DEFENDANTS failed to provide a “clear and reasonable warning” to those consumers
2 and other individuals in California who have been, or who will be, exposed to DEHP through dermal
3 contact and/or ingestion resulting from their use of the PRODUCTS.

4 36. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
5 directly by California voters, consumers and other individuals exposed to DEHP through dermal
6 contact and/or ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without
7 a “clear and reasonable” health hazard warning, have suffered, and continue to suffer, irreparable
8 harm for which they have no plain, speedy, or adequate remedy at law.

9 37. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS for
10 sale or use in violation of Health and Safety Code § 25249.6, and DEFENDANTS’ violations have
11 continued beyond their receipt of plaintiff’s Notice. As such, DEFENDANTS’ violations are
12 ongoing and continuous in nature and, unless enjoined, will continue in the future.

13 38. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
14 described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty of \$2,500
15 per day for each violation.

16 39. As a consequence of the above-described acts, Health and Safety Code § 25249.7(a)
17 also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

18 **PRAYER FOR RELIEF**

19 Wherefore, MY NGUYEN prays for relief and judgment against DEFENDANTS, and each of
20 them, as follows:

21 1. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily and
22 permanently enjoin DEFENDANTS from manufacturing, distributing, importing, selling, or
23 otherwise offering the PRODUCTS for sale or use in California without first providing a “clear and
24 reasonable warning” regarding the harms associated with exposures to DEHP;

25 2. That the Court, pursuant to Health and Safety Code § 25249.7(a), issue preliminary
26 and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the
27 chain of commerce in California without a “clear and reasonable warning”;

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3. That the Court, assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation of Proposition 65, in an amount to be determined at trial;

4. That the Court award plaintiff its reasonable attorneys' fees and costs of suit, incurred herein; and

5. That the Court grant any further relief as the Court may deem just and equitable.

Dated: August 19, 2021

Respectfully submitted,

SEVEN HILLS LLP



Kimberly Gates Johnson
Attorneys for Plaintiff
My Nguyen