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ENDORSED
FILED
ALAMEDA COUNTY

FEB 26 2021

CLERK OF THE SUPERIOR COURT
Joshua T.N. Rose
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,

vs.

DTX INTERNATIONAL, INC.,
LOWE'S HOME CENTERS, LLC,
Defendants.

Case No.: **HG21092873**

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

(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.

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 Pentagon air hoses sold and/or distributed by defendant DTX International, Inc. ("DTX") and defendant Lowe's Home Centers, LLC ("Lowe's") (collectively, the "Defendants") in California.

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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 Defendants distribute and/or offer for sale in California,
19 without a requisite exposure warning, Pentagon air hoses (the “Products”) that expose persons to
20 DEHP.

21 7. Defendants’ 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 Defendants to the enjoinder and civil
24 penalties described herein.

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

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
28 Defendants 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 DTX, through its business, effectively imports, distributes, sells, and/or
10 offers the Products for sale or use in the State of California, or it implies by its conduct that it
11 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
12 Plaintiff alleges that defendant DTX is a "person" in the course of doing business within the
13 meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 13. Defendant Lowe's, through its business, effectively imports, distributes, sells,
15 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
16 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
17 Plaintiff alleges that defendant Lowe's is a "person" in the course of doing business within the
18 meaning of Health & Safety Code sections 25249.6 and 25249.11.

19 **VENUE AND JURISDICTION**

20 14. Venue is proper in the County of Alameda because one or more of the instances of
21 wrongful conduct occurred, and continue to occur in this county and/or because Defendants
22 conducted, and continue to conduct, business in the County of Alameda with respect to the
23 Products.

24 15. This Court has jurisdiction over this action pursuant to California Constitution
25 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
26 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement
27 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
28 jurisdiction over this lawsuit.

1 16. This Court has jurisdiction over Defendants because each defendant is either a
2 citizen of the State of California, has sufficient minimum contacts with the State of California, is
3 registered with the California Secretary of State as foreign corporations authorized to do business
4 in the State of California, and/or has otherwise purposefully availed itself of the California market.
5 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
6 and permissible with traditional notions of fair play and substantial justice.

7 **STATUTORY BACKGROUND**

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

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

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

17 19. An exposure to a chemical in a consumer product is one “which results from a
18 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
19 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
20 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
21 shall provide a warning to any person to whom the product is sold or transferred unless the product
22 is packaged or labeled with a clear and reasonable warning.”

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

- 25 a. A warning that appears on a product’s label or other labeling.

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

3 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
4 and/or sold the Products in California since at least September 8, 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, Defendants have 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 each 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 September 8, 2020, Plaintiff gave notice of alleged violation of Health and
17 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens
18 to DEHP contained in the Products without proper warning, subject to a private action to
19 Defendants and to the California Attorney General's office and the offices of the County District
20 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
21 the herein 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 Defendants under Proposition 65 to enforce the alleged violations which
2 are 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 Defendants, as required by law.

5 **FIRST CAUSE OF ACTION**

6 **(By Plaintiff against Defendants 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. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
10 of the Products.

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 Products do 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 September 8, 2020, continuing until the present, that Defendants have
16 continued to knowingly and intentionally expose California users and consumers of the Products
17 to 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. Users can be exposed to DEHP by
21 dermal absorption through direct handling of the Products during routine use. If the Products are
22 stored or transported in a carrier, DEHP that leaches from the Products may contaminate other
23 articles contained within these closed spaces that are subsequently handled, worn, mouthed, or
24 ingested by the user. Finally, while direct mouthing of the Products does not seem likely, some
25 amount of exposure through ingestion can occur by touching the Products with subsequent
26 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. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Products exposes individuals to DEHP, and Defendants intend 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, Defendants are 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 Defendants.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff demands judgment against Defendants 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 Defendants 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 26, 2021

BRODSKY & SMITH, LLC

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