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ALAMEDA COUNTY

MAY 05 2021

CLERK OF THE COURT

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

11 ANTHONY FERREIRO,
12 Plaintiff,

13 vs.

14 THE HOME DEPOT, INC.,
15 Defendant.

Case No.:

HG 21099964

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

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

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

18 **BACKGROUND OF THE CASE**

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

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People's right to be informed of the health
27 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP) and diisononyl phthalate
28 (DINP), toxic chemicals found in wicker fishing creels/baskets sold and/or distributed by
defendant The Home Depot, Inc. ("Home Depot" or the "Defendant") in California.

1 3. DEHP is a harmful chemical known to the State of California to cause cancer and
2 reproductive toxicity, and DINP is a harmful chemical known to the State of California to cause
3 cancer. On January 1, 1988 (DEHP) and on December 20, 2013 (DINP), the State of California
4 listed DEHP and DINP as chemicals known to the State to cause cancer and each chemical has
5 come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, §
6 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of
7 California listed DEHP as a chemical known to cause reproductive toxicity.

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 Defendant distributes and/or offers for sale in California,
20 without a requisite exposure warning, wicker fishing creels/baskets (the “Products”) that expose
21 persons to DEHP and DINP.

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

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

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendant to provide purchasers or users of the Products with required warnings related to the
3 dangers and health hazards associated with exposure to DEHP and DINP pursuant to Health and
4 Safety Code § 25249.7(a).

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

6 **PARTIES**

7 11. Plaintiff is a citizen of the State of California acting in the interest of the general
8 public to promote awareness of exposures to toxic chemicals in products sold in California and to
9 improve human health by reducing hazardous substances contained in such items. She brings this
10 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

11 12. Defendant Home Depot, through its business, effectively imports, distributes, sells,
12 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
13 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.

14 13. Plaintiff alleges that defendant Home Depot is a "person" in the course of doing
15 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 **VENUE AND JURISDICTION**

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

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

26 16. This Court has jurisdiction over Defendant because Defendant is either a citizen of
27 the State of California, has sufficient minimum contacts with the State of California, is registered
28 with the California Secretary of State as foreign corporations authorized to do business in the State

1 of California, and/or has otherwise purposefully availed itself of the California market. Such
2 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
3 permissible with traditional notions of fair play and substantial justice.

4 **STATUTORY BACKGROUND**

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

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

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

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

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

- 22 a. A warning that appears on a product’s label or other labeling.
- 23 b. Identification of the product at the retail outlet in a manner which provides
24 a warning. Identification may be through shelf labeling, signs, menus, or a combination
25 thereof.

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 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 (DEHP) and on December 20, 2013 (DINP), the State of
16 California listed DEHP and DINP as chemicals known to the State to cause cancer. Cal. Code
17 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003,
18 the State of California listed DEHP as a chemical known to cause reproductive toxicity. In
19 summary, the Listed Chemicals were listed under Proposition 65 as chemicals known to the State
20 to cause cancer and/or reproductive toxicity.

21 23. The consumer exposures that are the subject of this Complaint result from through
22 dermal absorption. Users may be exposed to DEHP/DINP by dermal absorption through direct
23 skin contact with the Products during routine use when the Products are manipulated with bare
24 hands. Concentrations of DEHP/DINP can be expected to build within the enclosed interior of the
25 Products. This DEHP/DINP can potentially be absorbed to the surface of the interior contents that
26 can be subsequently handled, worn, mouthed, or ingested by the user. If the Products are stored or
27 transported in a carrier, DEHP/DINP that leaches from the purse may contaminate other articles
28 contained within these closed spaces that are subsequently handled, worn, mouthed, or ingested

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

4 24. Defendant has manufactured, processed, marketed, distributed, offered to sell
5 and/or sold the Products in California since at least September 23, 2020. The Products continue to
6 be distributed and sold in California without the requisite warning information.

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

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

16 **SATISFACTION OF NOTICE REQUIREMENTS**

17 27. On September 23, 2020, Plaintiff gave notice of alleged violation of Health and
18 Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens
19 to DEHP and DINP contained in the Products without proper warning, subject to a private action
20 to Defendant and to the California Attorney General's office and the offices of the County District
21 attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein
22 the herein violations allegedly occurred.

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

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

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

7 **FIRST CAUSE OF ACTION**

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

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

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

13 33. The Products contain DEHP and DINP, hazardous chemicals found on the
14 Proposition 65 list of chemicals known to be hazardous to human health.

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

16 35. Plaintiff, based on his best information and belief, avers that at all relevant times
17 herein, and at least since September 23, 2020, continuing until the present, that Defendant has
18 continued to knowingly and intentionally expose California users and consumers of the Product to
19 DEHP and DINP without providing required warnings under Proposition 65.

20 36. The exposures that are the subject of the Notice result from the purchase,
21 acquisition, handling and recommended use of the Products. Consequently, the primary route of
22 exposure to these chemicals is through dermal absorption. Users may be exposed to DEHP/DINP
23 by dermal absorption through direct skin contact with the Products during routine use when the
24 Products are manipulated with bare hands. Concentrations of DEHP/DINP can be expected to
25 build within the enclosed interior of the Products. This DEHP/DINP can potentially be absorbed
26 to the surface of the interior contents that can be subsequently handled, worn, mouthed, or ingested
27 by the user. If the Products are stored or transported in a carrier, DEHP/DINP that leaches from
28 the purse may contaminate other articles contained within these closed spaces that are subsequently

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

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

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

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

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

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

17 **PRAYER FOR RELIEF**

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

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

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

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

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

28 Dated: May 5, 2021

BRODSKY SMITH

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