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Superior Court of California,
County of San Francisco

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Clerk of the Court
BY: KAREN VALDES
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

9 PRECILA BALABBO,
10 Plaintiff,

11 vs.

12 KOHL'S, INC., KOHL'S
13 CORPORATION.,
14 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

CGC-22-598548

15 Plaintiff Precila Balabbo ("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 Diisononyl phthalate (DINP), a toxic chemical found in Kohl's
27 Hearts Vinyl Tablecloth, Style 11CTLVDTC01-52X70, UPC # 400307900933 sold and/or
28

1 distributed by defendant Kohl's Inc. and/or defendant Kohl's Corporation (collectively, "Kohl's"
2 or "Defendants") in California.

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

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 that will create an exposure above safe harbor levels with a "clear and
12 reasonable" warning before "knowingly and intentionally" exposing any person to any such listed
13 chemical.

14 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
15 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
16 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
17 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
18 actions of a defendant which "violate or threaten to violate" the statute. Health & Safety Code §
19 25249.7.

20 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
21 without a requisite exposure warning, Hearts Vinyl Tablecloth, Style 11CTLVDTC01-52X70,
22 UPC # 400307900933 (the "Products") that expose persons to DINP when used for their intended
23 purpose.

24 7. Defendants' failure to warn consumers and other individuals in California of the
25 health hazards associated with exposure to DINP in conjunction with the sale and/or distribution
26 of the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and civil
27 penalties described herein.

28

1 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
2 65 in accordance with Health and Safety Code § 25249.7(b).

3 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
4 Defendants to provide purchasers or users of the Products with required warnings related to the
5 dangers and health hazards associated with exposure to DINP pursuant to Health and Safety Code
6 § 25249.7(a).

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

8 **PARTIES**

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

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

18 **VENUE AND JURISDICTION**

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

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

1 15. 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 16. 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 17. 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. 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 18. 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 19. 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 23. Defendants have manufactured, processed, marketed, distributed, offered to sell
2 and/or sold the Products in California since at least March 16, 2021. The Products continue to be
3 distributed and sold in California without the requisite warning information.

4 24. At all times relevant to this action, Defendants have knowingly and intentionally
5 exposed users of the Products to DINP without first giving a clear and reasonable exposure
6 warning to such individuals.

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

13 **SATISFACTION OF NOTICE REQUIREMENTS**

14 26. February 3, 2021, Plaintiff purchased the Product from Kohl's. At the time of
15 purchase, Kohl's did not provide a Proposition 65 exposure warning for DINP or any other
16 Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
17 *supra*.

18 27. On or about March 2, 2021, the Product was sent to a testing laboratory for
19 phthalate testing to determine the phthalate content of the Product.

20 28. March 3, 2021, the laboratory provided the results of its analysis. Results of this
21 test determined the Product exposes users to DINP (the "Chemical Test Report").

22 29. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
23 to determine if, based on the findings of the Chemical Test Report and the reasonable and
24 foreseeable use of the Product, exposure to DINP will occur at levels that require Proposition 65
25 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
26 Code of Regulations.

27
28

1 30. On March 14, 2021, Plaintiff received from the analytical chemist an exposure
2 assessment report which concluded that persons in California who use the Products will be exposed
3 to levels of DINP that require a Proposition 65 exposure warning.

4 31. On March 16, 2021, Plaintiff gave notice of alleged violation of Health and Safety
5 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
6 DINP from use of the Products without proper warning, subject to a private action to Defendants
7 and to the California Attorney General’s office and the offices of the County District attorneys and
8 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
9 violations allegedly occurred.

10 32. The Notice complied with all procedural requirements of Proposition 65 including
11 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
12 least one person with relevant and appropriate expertise who reviewed relevant data regarding
13 DINP exposure, and that counsel believed there was meritorious and reasonable cause for a private
14 action.

15 33. After receiving the Notice, and to Plaintiff’s best information and belief, none of
16 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
17 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
18 are the subject of the Notice.

19 34. Plaintiff is commencing this action more than sixty (60) days from the date of the
20 Notice to Defendants, as required by law.

21 **FIRST CAUSE OF ACTION**

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

23 35. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 34 of
24 this Complaint as though fully set forth herein.

25 36. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
26 of the Products.

27 37. Use of the Products will expose users and consumers thereof to DINP, a hazardous
28 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

1 38. The Products do not comply with the Proposition 65 warning requirements.

2 39. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since March 16, 2021, continuing until the present, that Defendants have
4 continued to knowingly and intentionally expose California users and consumers of the Products
5 to DINP without providing required warnings under Proposition 65.

6 40. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling, and recommended use of the Products. Consequently, the primary route of
8 exposure to these chemicals is through dermal absorption. Dermal absorption of DINP can occur
9 through direct skin contact when the Products are contacted with bare hands, exposed skin, or
10 when the user interacts with the product for its intended purpose. Finally, some amount of exposure
11 through ingestion will occur by touching the Products with subsequent touching of the user's hand
12 to mouth.

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

16 42. Defendants have knowledge that the normal and reasonably foreseeable use of the
17 Products exposes individuals to DINP, and Defendants intend that exposures to DINP will occur
18 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of
19 the Products to consumers in California

20 43. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
21 Complaint.

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

24 45. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
25 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
3 relief:

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

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

9 C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit, in the
10 amount of \$50,000.00.

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

12 Dated: March 7, 2022

BRODSKY & SMITH

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