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Superior Court of California,
County of San Francisco

01/21/2022
Clerk of the Court
BY: KAREN VALDES
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,
12 Plaintiff,

13 vs.

14 BED BUG 911 CORP.,
15 THE HOME DEPOT, INC.,
16 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

CGC-22-597758

17 Plaintiff Gabriel Espinoza (“Plaintiff”), by and through his attorneys, alleges the following
18 cause of action in the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

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

26 2. This complaint is a representative action brought by Plaintiff in the public interest
27 of the citizens of the State of California to enforce the People’s right to be informed of the health
28 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
Hygea Natural mattress protectors, sold and/or distributed by defendant Bed Bug 911 Corp. (“Bed

1 Bug 911”) and/or defendant The Home Depot, Inc. (“Home Depot”) (collectively, “Defendants”)
2 in California.

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

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
10 within California or sell products therein to comply with Proposition 65 regulations. Included in
11 such regulations is the requirement that businesses must label any product containing a Proposition
12 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
13 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
14 chemical.

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
16 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
17 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
18 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
19 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
20 25249.7.

21 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
22 without a requisite exposure warning, Hygea Natural mattress protectors (the “Products”) that
23 expose persons to DEHP when used for their intended purpose.

24 7. Defendants’ failure to warn consumers and other individuals in California of the
25 health hazards associated with exposure to DEHP 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.

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 DEHP 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 Bed Bug 911, 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 Bed Bug 911 is a "person" in the course of doing business within
17 the meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 13. Defendant Home Depot, through its business, effectively imports, distributes, sells,
19 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
20 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
21 Plaintiff alleges that defendant Home Depot is a "person" in the course of doing business within
22 the meaning of Health & Safety Code sections 25249.6 and 25249.11.

23 **VENUE AND JURISDICTION**

24 14. Venue is proper in the County of San Francisco because one or more of the
25 instances of wrongful conduct occurred, and continue to occur in this county and/or because
26 Defendants conducted, and continue to conduct, business in the County of San Francisco with
27 respect to the Products.
28

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

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

12 **STATUTORY BACKGROUND**

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

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

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

21 19. An exposure to a chemical in a consumer product is one “which results from a
22 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
23 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
24 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
25 shall provide a warning to any person to whom the product is sold or transferred unless the product
26 is packaged or labeled with a clear and reasonable warning.”

1 reproductive toxicity. In summary, the DEHP was listed under Proposition 65 as a chemical known
2 to the State to cause cancer and reproductive toxicity.

3 23. The consumer exposures that are the subject of this Complaint result from dermal
4 absorption. Dermal absorption of DEHP can occur through direct skin contact when the Products
5 are contacted with bare hands or exposed skin. Finally, while mouthing of the Products does not
6 seem likely, some amount of exposure through ingestion can occur by touching the Products with
7 subsequent touching of the user's hand to mouth.

8 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
9 and/or sold the Products in California since at least March 16, 2021. The Products continue to be
10 distributed and sold in California without the requisite warning information.

11 25. At all times relevant to this action, Defendants have knowingly and intentionally
12 exposed users of the Products to DEHP without first giving a clear and reasonable exposure
13 warning to such individuals.

14 26. As a proximate result of acts by each defendant, as a person in the course of doing
15 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
16 California, including in San Francisco County, have been exposed to DEHP without a clear and
17 reasonable warning on the Products. The individuals subject to the violative exposures include
18 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
19 the Products.

20 **SATISFACTION OF NOTICE REQUIREMENTS**

21 27. Plaintiff purchased the Product from Home Depot. At the time of purchase, Bed
22 Bug 911 and Home Depot did not provide a Proposition 65 exposure warning for DEHP or any
23 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
24 *supra*.

25 28. The Product was sent to a testing laboratory to determine the phthalate
26 concentration of the Product.

27 29. The laboratory provided the results of its analysis. Results of this test concluded
28 there was excess presence of DEHP content (the "Chemical Test Report").

1 30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
2 to determine if, based on the findings of the Chemical Test Report and the reasonable and
3 foreseeable use of the Product, exposure to DEHP will occur at levels that require Proposition 65
4 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
5 Code of Regulations.

6 31. Plaintiff received from the analytical chemist an exposure assessment report which
7 concluded that persons in California who use the Products will be exposed to levels of DEHP that
8 require a Proposition 65 exposure warning.

9 32. On March 16, 2021, Plaintiff gave notice of alleged violation of Health and Safety
10 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
11 DEHP contained in the Products without proper warning, subject to a private action to Defendants
12 and to the California Attorney General’s office and the offices of the County District attorneys and
13 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
14 violations allegedly occurred.

15 33. The Notice complied with all procedural requirements of Proposition 65 including
16 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
17 least one person with relevant and appropriate expertise who reviewed relevant data regarding
18 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private
19 action.

20 34. After receiving the Notice, and to Plaintiff’s best information and belief, none of
21 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
22 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
23 are the subject of the Notice.

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

26 **FIRST CAUSE OF ACTION**

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

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

3 37. Use of the Products expose consumers to DEHP, a hazardous chemical found on
4 the Proposition 65 list of chemicals known to be hazardous to human health.

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

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

10 40. The exposures that are the subject of the Notice result from the purchase,
11 acquisition, handling and recommended use of the Products. Consequently, the primary route of
12 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can occur
13 through direct skin contact when the Products are contacted with bare hands or exposed skin.
14 Finally, while mouthing of the Products does not seem likely, some amount of exposure through
15 ingestion can occur by touching the Products with subsequent touching of the user's hand to mouth.

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

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

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

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

27 45. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
28 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: January 21, 2022

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