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ELECTRONICALLY
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Superior Court of California,
County of San Francisco

01/14/2022
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 TENACIOUS HOLDINGS, INC.,
15 HD SUPPLY, INC.,
16 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

CGC-22-597651

17 Plaintiff Anthony Ferreiro (“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
Ergodyne Glowear High Visibility Apparel vests sold and/or distributed by defendant Tenacious

1 Holdings, Inc. (“Tenacious”) and/or defendant HD Supply, Inc. (“HD Supply”) (collectively,
2 “Defendants”) 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, Ergodyne Glowear High Visibility Apparel vests (the
23 “Products”) that 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 Tenacious, 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 Tenacious is a “person” in the course of doing business within the
17 meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 13. Defendant HD Supply, 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 HD Supply is a “person” in the course of doing business within the
22 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.

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

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

4 b. Identification of the product at the retail outlet in a manner which provides
5 a warning. Identification may be through shelf labeling, signs, menus, or a combination
6 thereof.

7 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
8 prominently placed upon a product’s labels or other labeling or displayed at the retail outlet
9 with such conspicuousness, as compared with other words, statements, designs, or devices
10 in the label, labeling or display as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use.

12 d. A system of signs, public advertising identifying the system and toll-free
13 information services, or any other system that provides clear and reasonable warnings.

14 21. Proposition 65 provides that any “person who violates or threatens to violate” the
15 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
16 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
17 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
18 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
19 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

20 **FACTUAL BACKGROUND**

21 22. On January 1, 1988, the State of California listed DEHP as a chemical known to
22 the State to cause cancer and it has come under the purview of Proposition 65 regulations since
23 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
24 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
25

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 reproductive toxicity. In summary, DEHP was listed under Proposition 65 as a chemical known to
2 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. The primary route of exposure to DEHP is through dermal absorption directly through
5 the skin when consumers use, touch, or handle the Products. Some amount of exposure through
6 ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth.
7 No clear and reasonable warning is provided with the Products regarding the health hazards of
8 exposure to the DEHP.

9 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
10 and/or sold the Products in California since at least March 17, 2021. The Products continue to be
11 distributed and sold in California without the requisite warning information.

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

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

21 **SATISFACTION OF NOTICE REQUIREMENTS**

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

26 28. The Product was sent to a testing laboratory to determine the phthalate content of
27 the Product.

1 29. Results of this test concluded that the product contained elevated levels of DEHP
2 content (the “Chemical Test Report”).

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

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

11 32. On March 17, 2021, Plaintiff gave notice of alleged violation of Health and Safety
12 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
13 DEHP from use of the Products without proper warning, subject to a private action to Defendants
14 and to the California Attorney General’s office and the offices of the County District attorneys and
15 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
16 violations allegedly occurred.

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

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

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

28 **FIRST CAUSE OF ACTION**

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

2 36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 30 of
3 this Complaint as though fully set forth herein.

4 37. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
5 of the Products.

6 38. The Products contain DEHP, a hazardous chemical found on the Proposition 65 list
7 of chemicals known to be hazardous to human health.

8 39. The Product does not comply with the Proposition 65 warning requirements.

9 40. Plaintiff, based on his best information and belief, avers that at all relevant times
10 herein, and at least since March 17, 2021, continuing until the present, that Defendants have
11 continued to knowingly and intentionally expose California users and consumers of the Product to
12 DEHP without providing required warnings under Proposition 65.

13 41. The exposures that are the subject of the Notice result from the purchase,
14 acquisition, handling and recommended use of the Products. The primary route of exposure to
15 DEHP is through dermal absorption directly through the skin when consumers use, touch, or
16 handle the Products. Some amount of exposure through ingestion can occur by touching the
17 Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning
18 is provided with the Products regarding the health hazards of exposure to the DEHP.

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

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

26 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
27 Complaint.

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

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

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
7 relief:

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

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

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

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

16 Dated: January 14, 2022

BRODSKY & SMITH

17 By:  _____

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