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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

11/24/2021
Clerk of the Court
BY: KAREN VALDES
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CGC-21-596775

9 ANTHONY FERREIRO,

10 Plaintiff,

11 vs.

12 THE HOME DEPOT, INC.,

13 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

14 Plaintiff Anthony Ferreiro (“Plaintiff”), by and through his attorneys, alleges the following
15 cause of action in the public interest of the citizens of the State of California.

16 **BACKGROUND OF THE CASE**

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

23 2. This complaint is a representative action brought by Plaintiff in the public interest
24 of the citizens of the State of California to enforce the People’s right to be informed of the health
25 hazards caused by exposure to diisononyl phthalate (DINP), a toxic chemical found in Go Travel
26 pouches, UPC# 5016326006737 sold and/or distributed by defendant The Home Depot, Inc.
27 (“Home Depot” or the “Defendant”) in California.
28

1 3. DINP is a harmful chemical known to the State of California to cause cancer. On
2 December 20, 2013, the State of California listed DINP as a chemical known to the State to cause
3 cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code
4 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

5 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
6 within California or sell products therein to comply with Proposition 65 regulations. Included in
7 such regulations is the requirement that businesses must label any product containing a Proposition
8 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
9 reasonable” warning before “knowingly and intentionally” exposing any person to any such
10 chemical.

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

17 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
18 without a requisite exposure warning, Design Go pouches, UPC# 5016326006737 (the “Products”)
19 that expose persons to DINP when used for their intended purpose.

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

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

26 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
27 Defendant to provide purchasers or users of the Products with required warnings related to the
28

1 dangers and health hazards associated with exposure to DINP 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 Home Depot, through its business, effectively imports, distributes, sells,
10 and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
11 it imports, distributes, sells, and/or offers the Products for sale or use in the State of California.
12 Plaintiff alleges that defendant Home Depot is a "person" in the course of doing business within
13 the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 13. Defendant Zoro Tools, 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 Zoro Tools 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 San Francisco because one or more of the
21 instances of wrongful conduct occurred, and continue to occur in this county and/or because
22 Defendant conducted, and continues to conduct, business in the County of San Francisco with
23 respect to the 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 Defendant because defendant is either a citizen of
 2 the State of California, has sufficient minimum contacts with the State of California, is registered
 3 with the California Secretary of State as foreign corporations authorized to do business in the State
 4 of California, and/or has otherwise purposefully availed itself of the California market. Such
 5 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
 6 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 24. Defendant has manufactured, processed, marketed, distributed, offered to sell
2 and/or sold the Products in California since at least February 10, 2021. The Products continue to
3 be distributed and sold in California without the requisite warning information.

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

7 26. 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 27. On March 23, 2021, Plaintiff gave notice of alleged violation of Health and Safety
15 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to
16 DINP from use of the Products without proper warning, subject to a private action to Defendant
17 and to the California Attorney General’s office and the offices of the County District attorneys and
18 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
19 violations allegedly occurred.

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

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

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

3 **FIRST CAUSE OF ACTION**

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

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

7 32. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
8 the Products.

9 33. The Products contain DINP, a hazardous chemical found on the Proposition 65 list
10 of chemicals known to be hazardous to human health.

11 34. The Products do not comply with the Proposition 65 warning requirements.

12 35. Plaintiff, based on his best information and belief, avers that at all relevant times
13 herein, and at least since March 23, 2021, continuing until the present, that Defendant has
14 continued to knowingly and intentionally expose California users and consumers of the Products
15 to DINP without providing required warnings under Proposition 65.

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

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

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

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

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

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

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following
9 relief:

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

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

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

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

18 Dated: November 24, 2021

BRODSKY & SMITH

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