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ELECTRONICALLY
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Superior Court of California,
County of San Francisco

09/17/2021
Clerk of the Court
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Deputy Clerk

CGC-21-595251

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

9 GABRIEL ESPINOZA,

10 Plaintiff,

11 vs.

12 B & K INDUSTRIES, INC., LOWE'S
13 HOME CENTERS, LLC,

14 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

15 Plaintiff Gabriel Espinoza ("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 di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
27 ProLine tools with grips that expose to DEHP sold and/or distributed by defendant B & K
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1 Industries, Inc. (“B & K”) and defendant Lowe’s Home Centers, LLC (“Lowe’s”) (collectively,
2 the “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 with a “clear and reasonable” warning before “knowingly and intentionally”
13 exposing any person to any such listed 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, ProLine tools with grips (the “Products”) that expose
22 persons to DEHP.

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

27 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendants to provide purchasers or users of the Products with required warnings related to the
3 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code
4 § 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. He brings this
10 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

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

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

21 **VENUE AND JURISDICTION**

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

26 15. This Court has jurisdiction over this action pursuant to California Constitution
27 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
28 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement

1 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
2 jurisdiction over this lawsuit.

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

9 **STATUTORY BACKGROUND**

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

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

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

19 19. An exposure to a chemical in a consumer product is one “which results from a
20 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
21 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
22 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
23 shall provide a warning to any person to whom the product is sold or transferred unless the product
24 is packaged or labeled with a clear and reasonable warning.”
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1 reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a
2 chemical known 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. The primary route of exposure to the Listed Chemical is through dermal absorption
5 directly through the skin when consumers use, touch, or handle the Products. Some amount of
6 exposure through ingestion can occur by touching the Products with subsequent touching of the
7 user's hand to mouth. No clear and reasonable warning is provided with the Products regarding
8 the health hazards of exposure to the Listed Chemical.

9 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
10 and/or sold the Products in California since at least May 14, 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. On May 14, 2021, Plaintiff gave notice of alleged violation of Health and Safety
23 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
24 DEHP contained in the Products without proper warning, subject to a private action to Defendants
25 and to the California Attorney General's office and the offices of the County District attorneys and
26 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
27 violations allegedly occurred.

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

6 29. After receiving the Notice, and to Plaintiff's best information and belief, none of
7 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
8 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
9 are the subject of the Notice.

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

12 **FIRST CAUSE OF ACTION**

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

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

16 32. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
17 of the Products.

18 33. The Products contain DEHP, a hazardous chemical found on the Proposition 65 list
19 of chemicals known to be hazardous to human health.

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

21 35. Plaintiff, based on his best information and belief, avers that at all relevant times
22 herein, and at least since May 14, 2021, continuing until the present, that Defendants have
23 continued to knowingly and intentionally expose California users and consumers of the Products
24 to DEHP without providing required warnings under Proposition 65.

25 36. The exposures that are the subject of the Notice result from the purchase,
26 acquisition, handling and recommended use of the Products. The primary route of exposure to the
27 Listed Chemical is through dermal absorption directly through the skin when consumers use,
28 touch, or handle the Products. Some amount of exposure through ingestion can occur by touching

1 the Products with subsequent touching of the user’s hand to mouth. No clear and reasonable
2 warning is provided with the Products regarding the health hazards of exposure to the Listed
3 Chemical.

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 this known toxic chemical is removed from the Products.

7 38. Defendants have knowledge that the normal and reasonably foreseeable use of the
8 Products exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
9 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of
10 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, Defendants are 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 Defendants.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff demands judgment against Defendants 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 Defendants 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: September 17, 2021

BRODSKY SMITH

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