

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

05/25/2022
Clerk of the Court
BY: LAURA SIMMONS
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,

12 Plaintiff,

13 vs.

14 NEWELL OFFICE PRODUCTS, INC.,
15 NEWELL BRANDS, INC., NEWELL
16 OFFICE PRODUCTS COMPANY,

17 Defendants.

Case No.:

CGC-22-599797

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

18 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following
19 cause of action in the public interest of the citizens of the State of California.

20 **BACKGROUND OF THE CASE**

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

27 2. This complaint is a representative action brought by Plaintiff in the public interest
28 of the citizens of the State of California to enforce the People's right to be informed of the health
hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
ROLODEXes sold and/or distributed by defendant Newell Office Products, Inc., and/or Newell

Brands, Inc., and/or Newell Office Products Company, (collectively, “Newell” or “Defendants”) in California.

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

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

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

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

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

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

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

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

PARTIES

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

12. Defendants, through their business, effectively import, distribute, sell, and/or offer the Products for sale or use in the State of California, or they imply by their conduct that they import, distribute, sell, and/or offer the Products for sale or use in the State of California.

13. Plaintiff alleges that defendants are a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

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

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

1 16. 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 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.

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

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

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

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

FACTUAL BACKGROUND

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

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

1 24. Defendants have manufactured, processed, marketed, distributed, offered to sell
2 and/or sold the Products in California since at least June 3, 2021. The Products continue to be
3 distributed and sold in California without the requisite warning information.

4 25. At all times relevant to this action, Defendants have knowingly and intentionally
5 exposed users of the Products to DEHP without first giving a clear and reasonable exposure
6 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 DEHP 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 April 13, 2021, Plaintiff purchased the Product from Overstock.com. At the
15 time of purchase, Newell did not provide a Proposition 65 exposure warning for DEHP or any
16 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
17 *supra*.

18 28. On or about May 26, 2021, the Product was sent to a testing laboratory for phthalate
19 testing to determine the phthalate content of the Product.

20 29. On May 27, 2021, the laboratory provided the results of its analysis. Results of this
21 test determined the Product exposes users to DEHP (the “Chemical Test Report”).

22 30. 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 DEHP 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.

1 31. On June 3, 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 DEHP that require a Proposition 65 exposure warning.

4 32. On June 3, 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 DEHP 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 33. 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 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private
14 action.

15 34. 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 35. 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 36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of
24 this Complaint as though fully set forth herein.

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

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

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

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

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

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

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

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

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

23 46. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
24 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: May 26, 2022

BRODSKY & SMITH

13 By: 
14 Evan J. Smith (SBN242352)
15 Ryan P. Cardona (SBN302113)
16 9595 Wilshire Boulevard, Suite 900
17 Beverly Hills, CA 90212
18 Telephone: (877) 534-2590
19 Facsimile: (310) 247-0160

20 *Attorneys for Plaintiff*