

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

06/20/2023
Clerk of the Court
BY: MARK UDAN

Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-23-607180

11 GABRIEL ESPINOZA,

12 Plaintiff,

13 vs.

14 MAX'S WHOLESALE IMPORT AND
EXPORT, INC., MAX'S WHOLESALE,
LLC, DOLLAR KINGS, INC.,

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 lead, a toxic chemical found in scented candles, UPC #
27 692962507170, sold and/or distributed by defendants Max's Wholesale Import and Export, Inc.,
28 Max's Wholesale, LLC, and Dollar Kings, Inc. (collectively, "Defendants") in California.

1 3. Lead is a harmful chemical known to the State of California to cause cancer and
2 adverse developmental and reproductive effects in both males and females. On October 1, 1992,
3 the state of California listed lead as a chemical known to cause cancer and it has come under the
4 purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health
5 & Safety Code §§ 25249.8 & 25249.10(b). On February 27, 1987, the State of California listed
6 lead as a chemical known to cause adverse developmental and reproductive effects in both males
7 and females.

8 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
9 within California or sell products therein to comply with Proposition 65 regulations. Included in
10 such regulations is the requirement that businesses must label any product containing a Proposition
11 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
12 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
13 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, scented candles, UPC # 692962507170, (the “Products”)
22 that expose persons to lead when used for their intended purpose.

23 7. Defendants’ failure to warn consumers and other individuals in California of the
24 health hazards associated with exposure to lead in conjunction with the sale and/or distribution of
25 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 **VENUE AND JURISDICTION**

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

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

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

17 **STATUTORY BACKGROUND**

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

21 19. To effect this goal, Proposition 65 requires that individuals be provided with a
22 “clear and reasonable warning” before being exposed to substances listed by the State of California
23 as causing cancer and birth defects or other reproductive harm. H&S Code § 25249.6 states, in
24 pertinent part:

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

1 20. An exposure to a chemical in a consumer product is one “which results from a
2 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
3 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
4 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
5 shall provide a warning to any person to whom the product is sold or transferred unless the product
6 is packaged or labeled with a clear and reasonable warning.”

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

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

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

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

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

20 22. Proposition 65 provides that any “person who violates or threatens to violate” the
21 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
22 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
23 probability that a violation will occur.” (H&S Code § 25249.11(e).) Violators are liable for civil
24

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 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
2 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

3 **FACTUAL BACKGROUND**

4 23. On October 1, 1992, the state of California listed lead as a chemical known to cause
5 cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code
6 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On February 27,
7 1987, the State of California listed lead as a chemical known to cause adverse developmental and
8 reproductive effects in both males and females. In summary, lead was listed under Proposition 65
9 as a chemical known to the State to cause cancer and adverse developmental and reproductive
10 effects in both males and females.

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

17 25. Defendants have processed, marketed, distributed, offered to sell and/or sold the
18 Products in California since at least September 30, 2022. The Products continue to be distributed
19 and sold in California without the requisite warning information.

20 26. At all times relevant to this action, Defendants have knowingly and intentionally
21 exposed users and/or consumers of the Products to lead without first giving a clear and reasonable
22 exposure warning to such individuals.

23 27. As a proximate result of acts by Defendants, as a person in the course of doing
24 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
25 California, including in San Francisco County, have been exposed to lead without a clear and
26 reasonable warning on the Products. The individuals subject to the violative exposures include
27 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
28 the Products.

SATISFACTION OF NOTICE REQUIREMENTS

1
2 28. On August 12, 2022, Plaintiff purchased the Product from Dollar Kings, Inc. At the
3 time of purchase, Defendants did not provide a Proposition 65 exposure warning for lead or any
4 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
5 *supra*.

6 29. On or about September 6, 2022, the Product was sent to a testing laboratory to
7 determine the concentration of lead present on the surface of the Product.

8 30. On September 16, 2022, the laboratory provided the results of its analysis. Results
9 of this test determined the Product exposes users to lead (the “Chemical Test Report”).

10 31. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
11 to determine if, based on the findings of the Chemical Test Report and the reasonable and
12 foreseeable use of the Product, exposure to lead will occur at levels that require Proposition 65
13 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
14 Code of Regulations.

15 32. On September 30, 2022, Plaintiff received from the analytical chemist an exposure
16 assessment report which concluded that persons in California who use the Products will be exposed
17 to levels of lead that require a Proposition 65 exposure warning.

18 33. On September 30, 2022, Plaintiff gave notice of alleged violation of Health and
19 Safety Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens
20 to lead contained in the Products without proper warning, subject to a private action to Defendants
21 and to the California Attorney General’s office and the offices of the County District attorneys and
22 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
23 violations allegedly occurred.

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

1 35. After receiving the Notice, and to Plaintiff's best information and belief, none of
2 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
3 cause of action against Defendants under Proposition 65 to enforce the alleged violations which
4 are the subject of the Notice.

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

7 **FIRST CAUSE OF ACTION**

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

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

11 38. Defendants have, at all times mentioned herein, acted as distributor, and/or retailer
12 of the Product.

13 39. Use of the Products will exposed users to lead, a hazardous chemical found on the
14 Proposition 65 list of chemicals known to be hazardous to human health.

15 40. The Product does not comply with the Proposition 65 warning requirements.

16 41. Plaintiff, based on his best information and belief, avers that at all relevant times
17 herein, and at least since September 30, 2022, continuing until the present, that Defendants have
18 continued to knowingly and intentionally expose California users and consumers of the Product to
19 lead without providing required warnings under Proposition 65.

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

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

1 44. Defendants have knowledge that the normal and reasonably foreseeable use of the
2 Products exposes individuals to lead, and Defendants intend that exposures to lead will occur by
3 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
4 Products to consumers in California

5 45. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
6 Complaint.

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

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

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following
13 relief:

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

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

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

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

22 Dated: June 20, 2023

BRODSKY SMITH

23 By: 

24 Evan J. Smith (SBN242352)
25 Ryan P. Cardona (SBN302113)
26 9595 Wilshire Boulevard, Suite 900
27 Beverly Hills, CA 90212
28 Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff