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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

05/31/2024
Clerk of the Court
BY: AUSTIN LAM
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

CGC-24-615156

11 GABRIEL ESPINOZA,

12 Plaintiff,

13 vs.

14 THE HOME DEPOT, INC.,

15 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

16 Plaintiff Gabriel Espinoza (“Plaintiff”), by and through his attorneys, alleges the following
17 cause of action in the public interest of the citizens of the State of California.

18 **BACKGROUND OF THE CASE**

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

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People’s right to be informed of the health
27 hazards caused by exposure to lead, a toxic chemical found in KOVOT Good Morning Hottie
28 mugs, UPC # 610563563951 sold and/or distributed by defendant The Home Depot, Inc. (“Home
Depot” or “Defendant”) in California.

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

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

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
14 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
15 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
16 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
17 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
18 25249.7.

19 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
20 without a requisite exposure warning, KOVOT Good Morning Hottie mugs, UPC # 610563563951
21 (the “Products”) that expose persons to lead when used for their intended purpose.

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

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

28

1 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendant to provide purchasers or users of the Products with required warnings related to the
3 dangers and health hazards associated with exposure to lead 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 The Home Depot, Inc., through its business, effectively imports,
12 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
13 by its conduct that it imports, distributes, sells, and/or offers the Products for sale or use in the
14 State of California. Plaintiff alleges that defendant The Home Depot, Inc. is a “person” in the
15 course of doing business within the meaning of Health & Safety Code sections 25249.6 and
16 25249.11.

17 **VENUE AND JURISDICTION**

18 13. Venue is proper in the County of San Francisco because one or more of the
19 instances of wrongful conduct occurred, and continues to occur in this county and/or because
20 Defendant conducted, and continues to conduct, business in the County of San Francisco with
21 respect to the Products.

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

27 15. This Court has jurisdiction over Defendant because Defendant is either a citizen of
28 the State of California, has sufficient minimum contacts with the State of California, is registered

1 with the California Secretary of State as foreign corporations authorized to do business in the State
2 of California, and/or has otherwise purposefully availed itself of the California market. Such
3 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
4 permissible with traditional notions of fair play and substantial justice.

5 **STATUTORY BACKGROUND**

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

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

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

16 18. An exposure to a chemical in a consumer product is one “which results from a
17 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
18 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
19 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
20 shall provide a warning to any person to whom the product is sold or transferred unless the product
21 is packaged or labeled with a clear and reasonable warning.”

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

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

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

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

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

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

17 **FACTUAL BACKGROUND**

18 21. On October 1, 1992, the state of California listed lead as a chemical known to cause
 19 cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code
 20 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On February 27,
 21 1987, the State of California listed lead as a chemical known to cause birth defects or other
 22 reproductive harm. In summary, lead was listed under Proposition 65 as a chemical known to the
 23 State to cause cancer and birth defects or other reproductive harm.

24 22. The exposures that are the subject of the Notice result from the purchase,
 25 acquisition, handling and recommended use of the Product. The primary route of exposure to the
 26 is through dermal absorption directly through the skin when consumers use, touch, or handle the
 27 Products. Exposure through ingestion will occur by touching the Product with subsequent touching
 28

1 of the user's hand to mouth. No clear and reasonable warning is provided with the Products
2 regarding the health hazards of exposure.

3 23. Defendant has processed, marketed, distributed, offered to sell and/or sold the
4 Products in California since at least March 27, 2023. The Products continue to be distributed and
5 sold in California without the requisite warning information.

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

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

15 **SATISFACTION OF NOTICE REQUIREMENTS**

16 26. Plaintiff purchased the Product from Home Depot. At the time of purchase,
17 Defendant did not provide a Proposition 65 exposure warning for lead or any other Proposition 65
18 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

19 27. The Product was sent to a testing laboratory to determine if, and what amount of,
20 lead would migrate and/or leach from the Products.

21 28. The laboratory provided the results of its analysis. Results of this test determined
22 the Product exposes users to lead (the "Chemical Test Report").

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

1 30. On March 27, 2023, 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 lead that require a Proposition 65 exposure warning.

4 31. On March 27, 2023, Plaintiff gave notice of alleged violation of Health and Safety
5 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to lead
6 contained in the Products without proper warning, subject to a private action to Defendant and to
7 the California Attorney General’s office and the offices of the County District attorneys and City
8 Attorneys for each city with a population greater than 750,000 persons wherein the herein
9 violations allegedly occurred.

10 32. 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 lead
13 exposure, and that counsel believed there was meritorious and reasonable cause for a private
14 action.

15 33. 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 Defendant under Proposition 65 to enforce the alleged violations which are
18 the subject of the Notice.

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

21 **FIRST CAUSE OF ACTION**

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

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

25 36. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer of
26 the Product.

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

1 38. The Product does not comply with the Proposition 65 warning requirements.

2 39. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since March 27, 2023, continuing until the present, that Defendant has
4 continued to knowingly and intentionally expose California users and consumers of the Product to
5 lead without providing required warnings under Proposition 65.

6 40. 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. Exposure through ingestion will occur by touching the Product with subsequent touching
10 of the user's hand to mouth. No clear and reasonable warning is provided with the Products
11 regarding the health hazards of exposure.

12 41. 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 42. Defendant has knowledge that the normal and reasonably foreseeable use of the
16 Products exposes individuals to lead, and Defendant intends that exposures to lead will occur by
17 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
18 Products to consumers in California

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

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

23 45. 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 Defendant.


PRAYER FOR RELIEF

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

- A. That the court assess civil penalties against Defendant in the amount of \$2,500 per day for each violation for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);
- B. That the court preliminarily and permanently enjoin Defendant mandating Proposition 65 compliant warnings on the Products;
- C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit, in the amount of \$50,000.00.
- D. That the court grant any further relief as may be just and proper.

Dated: May 31, 2024

BRODSKY SMITH



By: _____

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